

Maryjane Kenney

From: John Murray
Sent: Saturday, July 30, 2005 6:34 AM
To: Maryjane Kenney
Cc: Don Johnson
Subject: FW: Acton/Sewer: 40B and LIP Waivers

Please place this e-mail and its attachment in the packet for the 8th, under continues discussion of 139 Prospect St.

-----Original Message-----

From: Stephen Anderson
Sent: Friday, July 29, 2005 8:59 PM
To: Don Johnson; John Murray
Cc: Daniel C. Hill
Subject: Acton/Sewer: 40B and LIP Waivers

<<40 B Waivers>>
Gentlemen:

You always raise interesting questions, and the ones in the attached email about the BOS's ability to waive sewer betterments and/or sewer privilege fees in affordable housing matters are no exception.

In the context of a LIP application, the Board of Selectmen has considerable flexibility to impose conditions on its endorsement of a comprehensive permit application. Chapter 40B's "consistent with local needs" test is inapplicable. Therefore, consistent with the recent River Street LIP 40B matter, the Board could require that the developer pay the standard betterment or sewer privilege fee.

The question is more difficult in the context of a c. 40B comprehensive permit case. The Supreme Judicial Court observed in *Dennis Housing Corp. v. Dennis Zoning Bd. of Appeals*, 439 Mass. 71, 77 (2003):

Under Chapter 40B, a zoning board has "the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application," G.L. c. 40B, s. 21, and, in some circumstances, has the power to override requirements or restrictions that would normally be imposed by those local boards. See *Mahoney v. Board of Appeals of Winchester*, 366 Mass. 228, 232-233, 316 N.E.2d 606 (1974), appeal dismissed, 420 U.S. 903, 95 S.Ct. 822, 42 L.Ed.2d 834 (1975); *Board of Appeals of Hanover v. Housing Appeals Comm.* If the zoning board denies the application for comprehensive permit, or approves it only on conditions that make the project "uneconomic," the applicant may appeal to the housing appeals committee, which also has the power to override local regulations and direct the issuance of a comprehensive permit. G.L. c. 40B, §§ 22. See *Zoning Bd. of Appeals of Wellesley v. Ardmore Apartments Ltd. Partnership*, at 815-816.

The comprehensive permit scheme was designed to override local ordinances, bylaws, and regulations that impeded the development of affordable housing, not Statewide requirements set by the Legislature and State agencies. See *Board of Appeals of Maynard v. Housing Appeals Comm.*, 370 Mass. 64, 68 (1976) (comprehensive permit does not override wetlands protection scheme mandated by G.L. c. 131, § 40; *Board of Appeals of N. Andover v. Housing Appeals Comm.*, 4 Mass.App.Ct. 676, 679-680, 357 N.E.2d 936 (1976) (condition in comprehensive permit invalid where it purported to usurp procedures for resolving State building code disputes between builder and building inspector)).

So the question is whether a sewer betterment or sewer privilege fee is a requirement created by "local ordinances, bylaws, and regulations that impede[s] the development of affordable housing" or whether it is a "Statewide requirements set by the Legislature and State agencies." If it is the former, the ZBA can modify or waive it if appropriate for a 40B project; if it is the latter, the ZBA cannot waive it.

Based on a preliminary review, neither the courts nor the Housing Appeals Committee appears to have specifically addressed the applicability of c. 40B to sewer betterment assessments. (The parties and the HAC in in Anglewood Hous. Development v. Kingston ZBA, HAC No. 90-06 assumed that a local water connection fee was a local, rather than state, requirement - the question before the HAC was whether the fee rendered the project "uneconomic.")

Both sewer betterments and sewer privilege fees are authorized by statute (G.L. c. 83, ss. 15 and 17) and implemented by local bylaw. Since the current question arises in the context of a LIP project where the BOS is not constrained by the 40B analysis, it is unnecessary to reach the issue in the present case. Since the answer may have larger repercussions for future cases (e.g. development of the Grace property), I would like to reserve judgment on the issue and conduct additional research in the future if the question arises in a 40B context.

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Don Johnson

From: John Murray
Sent: Thursday, July 28, 2005 11:21 AM
To: Stephen Anderson
Cc: Don Johnson
Subject: 40 B Waivers

Steve,

The developer for 139 Prospect St. has asked the Board for the letter of support for its initial LIP Application. In addition, the developer has asked that the sewer betterment charge and any privilege fee be waived. My questions are:

Is this a legitimate waiver request under a LIP/40B application? Is the Board able to waive a betterment or grant an abatement under these circumstances? Is the Board able to waive a privilege fee?

John Murray